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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

GENE ANTHONY HOCHEVAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

R. BROWN WALLACE
Counsel of Record
SHELIA D. TIMS
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main, Suite 500
Oklahoma City, Oklahoma 73102
(405) 272-9241

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Attorneys for Petitioner

49 pp

QUESTION PRESENTED

Whether due process based fair warning is violated or defeated if an undercover agent, with facts in his exclusive control, refuses to give those facts when asked, but instead intentionally obscures those facts and thus deliberately interferes with a person's understanding of his acts so that the person cannot compare his acts to preexisting law, as contemplated in *United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432, (1997) and *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), and thus fair warning of foreseeable criminal liability is denied.

LIST OF PARTIES

Parties to the proceeding below included:

The United States of America,

Plaintiff/Respondent

Gene Anthony Hochevar,

Defendant/Petitioner

Gary Neil Cotten,

Defendant

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Gene Anthony Hochevar respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the decision entered on March 16, 2001, in *United States of America v. Gene Anthony Hochevar and Gary Neil Cotten*, Nos. 00-1289; 00-1563.

OPINION BELOW

The opinion of the United States Court of Appeals was not published. The case was styled *United States of America v. Gene Anthony Hochevar, and Gary Neil Cotten*, Nos. 00-1289; 00-1563. It was entered March 16, 2001. The text of the opinion is reproduced in the Appendix, p. 1, *et seq.*

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered March 16, 2001. The Court's jurisdiction to consider this petition from the final judgment of a United States Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1). Notification required by Rule 29.4(b) has been made.

CONSTITUTION PROVISION

Amendment V, Constitution of the United States of America:

> "No person shall be ... deprived of life, liberty or property, without due process of law ..."

STATEMENT OF THE CASE

Gene Anthony Hochevar ("Hochevar") and co-defendant Gary Neil Cotten ("Cotten") were indicted in the United States District Court for the Southern District of New York on multiple counts of securities fraud, wire fraud, one count of conspiracy to commit securities fraud, wire fraud, and commercial bribery, and one count of violating the Travel Act. The District Court had jurisdiction under 18 U.S.C. § 3231.

After a two-week jury trial, Hochevar was convicted of securities fraud, wire fraud and conspiracy to commit securities fraud and wire fraud, in violation of 18 U.S.C. § 371; 15 U.S.C. § 78j(b) and 78ff, and 17 C.F.R. § 240.10b-5; 18 U.S.C. § 1343, § 1346. Cotten was convicted on various counts. Cotten has not joined this petition for a writ of certiorari.

Hochevar was in the business of stock promoting. Hochevar's conviction arose from his business becoming

involved with an undercover "sting operation" conducted by the Federal Bureau of Investigation ("FBI"). FBI agent Joseph Yastremski, ("Undercover Agent") used the undercover name "Jeff Nolan" ("Undercover Agent") in the undercover investigation. The real Jeff Nolan was an actual NASD registered stockbroker, currently listed in the NASD's registry. (A-0057; Tr. 391-92)[1]

Undercover Agent engaged Hochevar and Cotten in ten recorded long distance telephone conversations, nine of which happened over ten days in early 1998. Hochevar's and Cotten's entire contact with Undercover Agent was by phone. Neither Hochevar nor Cotten ever met Undercover Agent, or had any other dealing with him.

In the recorded telephone conversations, Hochevar and Cotten promoted Undercover Agent to arrange the purchase of 250,000 shares of publicly traded corporate stock. As a part of the stock promotion, Undercover Agent was to receive 30,000 additional shares of stock from Hochevar and Cotten.

The indictment alleged that Undercover Agent was a securities broker. (A-0165.) Appendix, p. 7-9. Undercover Agent's identity as a stockbroker was critical to criminality.

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[1] "A" refers to the Appendix to Hochevar's brief in *United States v. Hochevar*, No. 00-1289, United States Court of Appeals for the Second Circuit. "Tr." refers to the trial transcript and related exhibits in *United States v. Hochevar*, No. 98 Cr. 351 (RO) United States District Court for the Southern District of New York.

His identity as a stockbroker established that he had customers, and that, in turn, established the obligations that the law says an NASD stockbroker owes to his customers. The 30,000 shares of stock Hochevar and Cotten agreed to transfer to Undercover Agent were alleged to be a bribe, paid to Undercover Agent for causing his brokerage customers to purchase the stock. The bribe allegedly corrupted duties and obligations that laws and regulations said that Undercover Agent would owe to his customers because he was a stockbroker.

Hochevar's and Cotten's stock promotion was alleged to be part of a "pump and dump" scheme intended to artificially inflate the stock price.

Hochevar defended the charges saying that he never believed that Undercover Agent was a stockbroker. From what Undercover Agent said in the recorded telephone calls -- Hochevar's sole source of information -- Hochevar did not and could not know whether Undercover Agent was a stockbroker. Because he could not know that Undercover Agent was a stockbroker, he could not know that paying him was criminal. Hochevar testified that he knew he could not pay a stockbroker, and that he never intended to pay a stockbroker. (A-0817; Tr. 632.)

Hochevar's entire source of information to identify Undercover Agent as a stockbroker was limited to what was said in the recorded long distance telephone calls. Undercover Agent never said he was a stockbroker. Instead of saying that he was a stockbroker, Undercover Agent

instructed an FBI informer, Cauley, to introduce Undercover Agent by telling Hochevar that Undercover Agent was a hedge fund manager (A-0495-97; Tr. 310-312). Appendix, p. 10-11. The informer followed these instructions. He told Hochevar that Undercover Agent was not a stockbroker, but managed a hedge fund and numerous other enterprises. (A-0023-24) Appendix, p. 11-12.

The recorded long distance telephone calls showed that Undercover Agent never corrected what the informer had told Hochevar about him not being a stockbroker. In addition to never telling Hochevar that he was a stockbroker, Undercover Agent avoided, three times, answering defendants' direct questions as to whether he was a stockbroker. Undercover Agent refused to say that he was a stockbroker. While refusing to answer defendants' direct questions about whether he was a stockbroker, Undercover Agent led defendants to believe he had been a stockbroker, but currently only managed a hedge fund. (A-0092-93), Appendix, p. 12-14.

At trial, the government argued that even though the informer told Hochevar that Undercover Agent was not a stockbroker, and even though Undercover Agent had never identified himself as a stockbroker, and even though Undercover Agent said he used to be a stockbroker, but now managed a hedge fund, still there was proof to allow a jury to infer the fact that Undercover Agent was a stockbroker, or, if not a stockbroker, at least a person who owed duties of some sort to customers.

The government argued there was enough proof because Undercover Agent said in the recorded calls that he was doing things that a stockbroker might do, and mentioned other things which suggested that he was really a stockbroker, or, in any event, a person who owed duties to third parties. (*e.g.*, App. 0636-37). The government emphasized that Hochevar, formerly a stockbroker himself, agreed to Undercover Agent's request to send the 30,000 shares of stock to a third party brokerage account and agreed to Undercover Agent's request to keep the payment confidential. The government showed that Cotten, while talking to Undercover Agent in a "three-way" recorded telephone conversation, failed to mention the shares offered to Undercover Agent when the third party, another FBI agent posing as Undercover Agent's customer, asked Undercover Agent the amount of commission that was charged for purchase of the shares of stock.

The trial judge did not know what the Undercover Agent was. He observed that Undercover Agent "... never called himself anything." (A-0564; Tr. 379) and "...didn't really say anything in these transcripts what he was." (A-0629; Tr. 444-45.) The case was submitted to a jury, in part upon Hochevar and Cotten's entrapment defense. The jury convicted Hochevar and Cotten.

On appeal to the United States Court of Appeals for the Second Circuit, Hochevar made a due process attack upon the misleading, intentional ambiguity and the deliberate refusal to identify Undercover Agent as a stockbroker. Hochevar argued that the misleading, the ambiguity, and the

refusal to identify Undercover Agent as a stockbroker destroyed reasonable opportunity to know that paying Undercover Agent was criminal under the wire and securities fraud statutes. It eroded the values protected by and effectively defeated his due process fair warning. In order to foresee criminality he had to know that Undercover Agent was a stockbroker. Because Undercover Agent's identity as a stockbroker was key to Hochevar's ability to foresee criminality under preexisting law, Hochevar argued that Undercover Agent could not use his exclusive control of his identity as a stockbroker to limit what Hochevar knew about his identity.

Hochevar made the due process attack on appeal under authority of *United States v. Cuervelo*, 949 F.2d 559, 565 (2nd Cir. 1991) (adverse judgment on entrapment defense does not prevent a constitutional challenge on appeal).

On appeal, the government conceded that the FBI informer had told Hochevar that Undercover Agent was not a stockbroker. (Gov't. Br., 4)[2] As to the remainder of Undercover Agent's vagueness and refusal to identify himself, the government explained that it meant only that Undercover Agent had left the "impression that the undercover agent's current status was uncertain." (Gov't Br., 32.)

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[2] "Gov't Br." refers to Brief for the United States of America in *United Sates of America v. Gene Anthony Hochevar and Gary Neil Cotten*, Nos. 00-1289, 00-1563, United States Court of Appeals for the Second Circuit.

To sustain the conviction, the government relied upon preexisting law which proscribed payments to NASD registered stockbrokers and other securities professionals. (Gov't. Br. 16-18; 21-24.) To match facts of the case to that law, the government had to show that Undercover Agent was a stockbroker by using the misleading; Undercover Agent's failure to identify himself as a stockbroker; his ambiguity about his current status; and his answering defendants' questions as to whether he were a stockbroker by saying he had been, but now managed a hedge fund.

To match facts of the case to the law, the government continued its argument that Undercover Agent's references to Undercover Agent doing things a stockbroker might do supported an inference of the fact that he was a stockbroker, or, in any event, a person who owed duties to a customer. This was particularly appropriate, the government argued, in light of Hochevar agreeing to Undercover Agent's request to send the 30,000 shares to a third person, to keep payment of the 30,000 shares confidential and Cotten's failure to mention the payment of the 30,000 shares to the FBI agent posing as Undercover Agent's customer.

The government said that Hochever's fair warning based challenge of the misleading, the ambiguity and the refusal to identify himself as a stockbroker was nothing more than re-argument of a fact question that the jury had settled when it convicted. The government asserted that due process fair warning analyses were limited to assessing the clarity of how a statute is worded. But, the government argued, evidence necessary to support a jury inference of Undercover

Agent's identity as a stockbroker provided enough clarity about duties to customers to meet Hochevar's constitutional rights. (Gov't Br., p. 29-33.)

The Second Circuit ruled against Hochevar's claim that his constitutionally protected right to fair warning was destroyed or defeated by the way Undercover Agent used his exclusive control over what Hochevar knew about his identity. The Second Circuit used a "sufficiency of evidence" analysis to deny Hochevar's due process based challenge to the government's actions. In the *Hochevar* opinion, the Second Circuit said, "Because the evidence supports a finding that the defendants knew that Nolan was carrying out the business of a 'broker' the defendants' fair warning argument fails." The Second Circuit also concluded that defendants' willingness to place the 30,000 additional shares into an account under the name of a third party, "...could lead a reasonable jury to conclude that the defendants were aware that such a payment was illegal, whether Nolan was a stockbroker or some other type of financial advisor." Appendix, p. 5-6.

Hochevar's due process challenge involved infringement of the right to fair warning, or, effective loss of foreseeability of criminality. The challenge does not question the sufficiency of evidence. Hochevar's challenge was directed to the way Undercover Agent controlled what Hochevar knew about his identity --- facts that were within Undercover Agent's exclusive control, that also were key to Hochevar's realizing that paying him was criminal. Hochevar knew that the law proscribed such payments to stockbrokers,

and said he did not intend to pay a stockbroker. He tried to find out if Undercover Agent was a stockbroker.

The significance of Undercover Agent's control over Hochevar's knowledge about his identity was demonstrated by Undercover Agent's testimony at trial. The government's own securities expert witness recognized that there was nothing illegal about Hochevar's business of stock promoting. (A-0358; Tr. 173.) But, as Undercover Agent pointed out, Hochevar's business could become criminal, depending upon, in Undercover Agent's own words, "who he is paying." (A-0704; Tr. 519.)

Undercover Agent's testimony made the point that explains the difficulty from his control of what Hochevar knew about whether he was paying a NASD registered stockbroker. Hochevar, while conducting an otherwise legal business, could possibly deal with people – such as stockbrokers – who owed duties to third parties. Hochevar needed to know if there were duties his payments could corrupt. If there were no duties, then he did not break the law. Because Undercover Agent controlled what Hochevar knew about his identity, Undercover Agent controlled what Hochevar needed to know to determine that his payment was criminal.

Even though Undercover Agent knew that Hochevar needed to know "who he [was] paying" to avoid criminality, he intentionally chose not to tell Hochevar that he was a stockbroker. Instead, he chose to be ambiguous. He explained at trial that he deliberately chose not to tell

Hochevar that he was a stockbroker. He did that because he did not have a "fully supported" undercover identity. Because he had not set up his undercover identity, he was concerned that if he plainly stated that he was a NASD registered stockbroker, defendants might check the registrations and discover that he was not the actual Jeff Nolan, who was an NASD listed stockbroker whose name Undercover Agent was using. (Tr. 391-92; A-0576-77.) Thus, the prosecution excused Undercover Agent's refusal to identify himself as an intentional act, but one intended to protect his cover and not a problematical effort to confuse defendants. (Gov't Br., p. 32.) Whatever the reason, Undercover Agent's action was deliberate. He could have said he was a stockbroker, but he chose not to.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT DECIDED A QUESTION OF FEDERAL LAW THIS COURT SHOULD SETTLE WHEN IT USED AN EVIDENTIARY ANALYSIS AND DECLINED TO APPLY A DUE PROCESS ANALYSIS TO HOCHEVAR'S CHALLENGE TO UNDERCOVER CONDUCT THAT IMPLICATED AND DEFEATED HIS RIGHT TO FAIR WARNING.

Due process based fair warning requires that the government be clear when it passes laws that say what acts are

criminal. *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

The indictment charged criminal bribery of a securities broker. Preexisting law was adequate for fair warning. That law made it clear that bribing a stockbroker is criminal.

Hochevar claims that fair warning was infringed, or effectively defeated, because the government, while in exclusive control of whether Undercover Agent was a stockbroker, deliberately and intentionally used that control to decline Hochevar's request for that fact, to mislead Hochevar and be ambiguous about that fact. The prosecution then used the deliberate ambiguity to ask the jury to infer the very fact that the undercover agent refused to give, and deliberately obscured.

The problem is that Hochevar acted upon his understanding of Undercover Agent's deliberate ambiguity, only to discover that the prosecution could argue and a jury could find that there was a different understanding – an understanding that made Hochevar's act criminal.

That exact risk is one this Court uses fair warning concepts to prevent legislatures from inflicting on people. *Connally v. General Constr. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed 322 (1926) ("Penal statutes ... should not admit of such double meaning that the citizen may act upon one conception of its requirements and the courts upon another.")

The concept of fair warning is not strictly limited to evaluating clarity of statutory wording. This Court has considered fair warning concepts in relation to matters concerning the actual application of a penal statute when that was necessary to protect the foreseeability of criminality that is the goal of fair warning. For example, in *Bouie v. City of Columbia*, 378 U.S. 374, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) the statute was clearly worded. This Court used fair warning concepts to prohibit a judicial interpretation of the clear statute that expanded its coverage to acts not previously known to be covered, and thus made criminal. There, the clarity and narrowness of the statute was significant because the narrowness and clarity, itself, interfered with a foreseeability that the acts defendant were engaging in could lead to criminal penalties. Only an expansive interpretation by a court brought that result.

Although Hochevar's challenge touches upon the evidence, it does not go to the sufficiency to support the verdict. Thus, the challenge is not adequately addressed by treating it as an issue of resolving "conflicting evidence", or whether a jury's verdict is supported by uncertain evidence. The issue Hochevar presents is a question of the propriety of Undercover Agent refusing to give a single fact, when asked, then deliberately rejecting clarity and choosing ambiguity as to the single fact. That single fact made an otherwise legal business fall under preexisting laws that imposed criminal penalties. That single fact was under exclusive government control. Hochevar questions whether due process protection of the fundamental value of foreseeable criminality was infringed or defeated by that deliberate government act.

The Court uses the due process requirement of fair warning to protect people from the government eroding values that are fundamental to our constitutional liberty. *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Among the values fundamental to our concept of constitutional liberty are the principles that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed" *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.989 (1954) and people should be able to steer between lawful and unlawful conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). A person should not have to risk acting upon one understanding of a law, only to discover later that a court has another, completely different understanding of that law. *Connally v. General Constr. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed 322 (1926). One should not have to "guess" about whether an act is criminal.

In sum, the fundamental values say the government must allow people opportunity to choose between lawful acts and unlawful acts. The government should not impose unforeseeable criminal responsibility for a person's conduct.

To preserve these values, due process imposes on the government the obligation to provide enough notice to assure that a person can foresee that acts carry criminal penalties. With foreseeability, a person can choose acts to avoid criminal liability. *See, Roberts v. Tennessee*, ___U.S. ___, 121 S.Ct. 1693, ___ L.Ed.2d ___. (Notice, foreseeability and fair warning are core due process concepts that bear on

constitutionality of attaching criminal penalties to what had previously been innocent conduct.)

This foreseeability is supplied by requiring reasonable clarity from the government about what the law intends to do if a certain line is passed. *McBoyle v. United States*, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816 (1931). The "touchstone" for fair warning is reasonable clarity that acts are criminal. *Lanier*, 520 U.S. 267.

A person's acts play a role in determining sufficiency of fair warning under the wire and securities fraud statutes. Those laws are written without a particularity in wording that describes the prohibited acts. Instead of attempting to describe the far ranging behaviors it intended to proscribe, Congress wrote those statutes to incorporate and then criminalize violations of a separate, broad body of law – the law of fraud and deceit. The result is that the statutes, themselves, and frequently the incorporated body of law, fail to describe forbidden acts with the particularity needed to satisfy due process and protect the values described in *Harriss* and *Grayned*.

This lack of clarity in describing proscribed acts was addressed in *United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) where the Court explained that, in the case of such statutes, the due process right to fair warning is satisfied if unlawfulness of the act is apparent in light of preexisting law. *Lanier* drew upon *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (Bivens action; qualified immunity) where government

officials are subjected to civil liability if a right allegedly violated is made sufficiently clear "that a reasonable official would understand that what he is doing" violates that right.

Lanier addressed only the clarity supplied by judicial gloss necessary to assure that a statute gives fair warning. But, *Lanier* demonstrates that acts, themselves, are a part of analyzing sufficiency of the due process right to fair warning. *Lanier* treated acts and preexisting law as two separate items. Fair warning is satisfied if these two separate items align or match with enough specificity to produce foreseeability of criminal liability.

While measuring fair warning concentrates on what legislatures and courts do with the law, itself, the actual, meaningful value of this due process right depends upon the ability to understand acts. Clear law which tells *Anderson's* "reasonable official" what is illegal has no meaningful value if the official cannot understand sufficiently what he is doing to let him relate what he is doing to clear law.

Generally, the government has no fair warning related concern with whether a person understands the nature of his acts. This is because the government usually has no active involvement with the defendant's acts.

But, when the government becomes involved in the facts of a case by using an undercover agent, it raises the reality that the undercover agent will have virtually exclusive control over some facts. Facts in exclusive government control may include facts necessary to understand an act

sufficiently to secure fair warning and foreseeability of criminal penalties provided by clear law.

More concretely, here Undercover Agent controlled, exclusively, the fact of whether he was a stockbroker. Hochevar had no other source for that information. Hochevar's foreseeability of the criminality of his transaction with Undercover Agent depended upon Hochevar knowing this single fact that was under exclusive government control. As Undercover Agent himself testified, Hochevar's otherwise legal business could become criminal, depending upon "who he [was] paying." If he was a stockbroker, it was criminal; if he was not a stockbroker, it was not criminal.

Taken as a whole, the record shows that the Undercover Agent handled his exclusive control of whether he was an NASD registered stockbroker by intentionally refusing to give Hochevar that fact, and then using deliberate ambiguity about that fact to build an evidentiary basis to ask a jury to infer that fact.

Hochevar challenges whether the government actions – deliberate vagueness with a fact it exclusively controlled, which was key to whether an apparently legal transaction fell under laws that made it criminal -- defeated due process rights of fair warning, and thus the foreseeability to steer away from criminal acts.

Hochevar has attacked this government behavior by identifying that foreseeability of criminality is a value fundamental to our concept of constitutional liberty. He has

shown that this Court protects foreseeability of criminality by using due process to require of the legislature clarity of law sufficient to preserve that fundamental value. Hochevar has shown that the real vitality of this due process right depends upon the understanding of acts sufficiently to benefit from the warning of clear law. Hochevar has pointed to absolutely intentional undercover behavior that was the sole and singular reason he was unable to understand a fact that made his acts fall under preexisting law that would allow him to foresee criminality in his otherwise legal business. He has shown that he acted upon one understanding of Undercover Agent's deliberate ambiguity, only to discover that a jury, after prosecution argument, decided there was a different understanding – an understanding that brought his act under preexisting law that made the act criminal. Hochevar has shown that this Court protects against this exact risk by using due process principles to prevent legislatures from undermining fundamental values with ambiguous law. *Connally v. General Constr. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

The Second Circuit's use of a "sufficiency of evidence" analysis misses the entire issue created by the uncontradicted proof of the government's deliberateness in obscuring key facts under its exclusive control. A "sufficiency of evidence" analysis does nothing more than to examine the ultimate effectiveness of the government's deliberate ambiguity, itself, and then does so with the subjective analysis that a jury uses – what can one conclude that Hochevar, himself, knew from this ambiguity? Under

that approach, there is no measure of the propriety of the government engaging in deliberate conduct of this nature.

An analysis that simply confirms the effectiveness of the ambiguity, itself, invites the very risk condemned in *Connally*. If a jury has convicted, such a test assures virtually automatic approval of a conviction where the government acts as the sole voice, and sole source, of a fact critical to foreseeing criminal penalties, and deliberately uses that unique position to create ambiguity that is sufficient to expose people to the risk of multiple meanings, one of which carries criminal liability. To approve that reduces clarity of law and the meaningful benefit from due process rights to the level of having to win a game of word skill and comprehension initiated by an undercover agent. That level should not be acceptable when the issue involved is a fundamental value protected by due process.

Rather than analyzing the government's deliberate ambiguity on a subjective basis that concentrates on Hochevar's understanding of the ambiguity and duplicates the work of the jury, a more appropriate approach is found by continuing *Lanier's* reference to *Anderson* principles. *Anderson* recognized the inevitable involvement of facts of a case in the process of evaluating whether a government official had qualified immunity from civil liability. *Anderson*, 483 U.S. at 641 (the determination will often require examination of the information possessed by officials). To accommodate the facts, yet not make a subjective analysis, *Anderson* applied an objective, albeit fact specific, analysis. That analysis turned upon concluding what a reasonable

government official could have believed about the legality of his acts, in light of clearly established law and the information that the official possessed at the time. If a reasonable official would have thought his act legal, then there is no exposure to civil liability. A like test could measure the effectiveness of delivery of the due process right to fair warning.

Further, under an *Anderson* type approach, a defendant could present the issue of government deliberateness in using ambiguity as an extraordinary circumstance that led to a reasonable, but mistaken, conclusion that his act was legal. *Anderson*, 483 U.S. at 641 (reasonable but mistaken conclusion of legality will not expose official to civil liability). A finding that deliberate government acts generated a reasonable, but mistaken, belief of legality would amount to interference with due process right to fair warning.

In other cases reviewing undercover behavior, this Court has recognized that undercover agents may use deceit, artifice and stratagem to catch those engaged in criminal enterprises. *Jacobson v. United States*, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). The underlying reasoning is that there are circumstances where deceit is the only practicable law enforcement technique available. *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366.

Even while recognizing the need and value of having tolerance for undercover behavior, this Court has dealt with the idea that the tolerance should have limits at some point. Cases from courts below dealing with undercover behavior

tend to involve instances of spectacular behavior being challenged under this Court's decision in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). *Russell* provided the comment that "... some day we may be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction..."

Although the *Russell* comment has produced allegations of "outrageous" conduct in numerous cases, there is a practical difficulty in application because *Russell* referenced, but did not define "outrageous." This difficulty of application was compounded by *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) where a plurality of the Court downplayed the "outrageous" concept and emphasized evaluating undercover behavior with the entrapment defense, which concentrates on a defendant's predisposition. As to due process, the *Hampton* plurality opinion observed that, "[t]he limitations of the Due Process Clause of the Fifth Amendment come into play only when Government activity in question violates some protected right of the defendant..."

Presently, a wide range of undercover activity, up to and including deceit, is allowed. *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 951, 17 L.Ed.2d 811 (1966). As to due process matters, all Courts of Appeals follow the policy of deference to the government's investigatory methods and regard the burden of establishing "outrageous" undercover behavior "very heavy." *See, e.g., United States v. Rahman*,

189 F.3d 88, 131 (2nd Cir. 1999), *cert. denied sub nom. Nosair v. United States*, 528 U.S. 982, 120 S.Ct. 439, 145 L.Ed.2d 344. Nonetheless, the Courts of Appeals continue to handle numerous attacks of allegedly "outrageous" undercover behavior which generally emphasize remarkable government behavior, but do little to connect that behavior to the denial or infringement of identified protected rights.

However realistic the policy of judicial tolerance, and however beneficial the reluctance to measure undercover activity with due process, protection should begin at the point that specific undercover acts are demonstrated to erode a value so fundamental to our concept of constitutional liberty to merit protection with due process standards. The foreseeability of criminality protected by due process requirements of clear law should not be eroded by deliberate undercover interference with a person's understanding his acts sufficiently to interfere with an ability to determine that the clear law warns that the act is criminal. As *Anderson* and *Lanier* demonstrate, understanding of acts play a key role in analyzing adequacy of the due process right to fair warning. A deliberate undercover act of that impedes the understanding, and thus the adequacy and meaningful vitality of due process rights, should be regarded a violation of a protected right sufficient to authorize a due process limitation of prosecution, as contemplated by *Hampton's* plurality.

Due process considerations are necessary to evaluate Hochevar's challenge because the entrapment defense does not effectively reach the issue. Entrapment is unavailable to a defendant if a jury finds the defendant had predisposition.

Hampton, 425 U.S. at 489. Undercover Agent's success in deliberately obscuring the key fact that turned Hochevar's otherwise legal business criminal had the understandable result of producing indications of willingness and predisposition for what Hochevar believed was a legal transaction. Undercover success in avoiding foreseeability of criminality carries with it, inherently, behavior by defendants that will show predisposition, and thus defeat the entrapment defense.

Court policy to permit latitude in undercover investigation and judicial reluctance to apply due process limits should not go so far as to allow deliberate undercover acts which defeat the effectiveness and purpose of due process rights that preserve the fundamental value of foreseeability of criminal liability.

CONCLUSION

A writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

R. BROWN WALLACE
Counsel of Record
SHELIA D. TIMS
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main, Suite 500
Oklahoma City, Oklahoma 73102
(405) 272-9241
FAX (405) 235-8786

Attorneys for Petitioners

APPENDIX

Appendix 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of March, Two Thousand and One.

PRESENT: HONORABLE Thomas J. Meskill,
HONORABLE Fred I. Parker,
HONORABLE Robert A. Katzmann,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
MAR 16 2001
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

Appendix 2

UNITED STATES OF AMERICA,
Appellee,

v. Nos. 00-1289, 00-1563

GENE ANTHONY HOCHEVAR, and
GARY NEIL COTTEN,
Defendants-Appellants.

APPEARING FOR APPELLANTS:
John W. Coyle, III
Coyle, McCoy & Burton
Oklahoma City, Oklahoma

Gary L. Richardson
Richardson, Stoops, Richardson
& Ward
Tulsa, Oklahoma

APPEARING FOR APPELLEE:
David C. Esseks
Assistant United States
Attorney for the Southern
District of New York
New York, New York

Appendix 3

USA v. Hochevar
Docket No. 00-1289

Appeal from the United States District Court for the Southern District of New York (Richard Owen, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said district court be and it hereby is AFFIRMED.

Defendants-appellants, Gene Anthony Hochevar and Gary Neil Cotten ("Hochevar" and "Cotten"), appeal from judgments of conviction entered on April 25, 2000 and August 2, 2000, respectively, in the United States District Court for the Southern District of New York (Richard Owen, Judge), following a two-week jury trial.

The indictment in this case was filed on April 16, 1998, in seven counts. Count One charged the defendants with conspiracy to commit securities fraud, wire fraud, and commercial bribery, in violation of 18 U.S.C. §371. Count Two charged both defendants with securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, and 17 C.F.R. § 240.10b-5. Hochevar was charged in Counts Three and Six, and Cotten was charged in Counts Three, Four, and Five, with wire fraud, in violation of 18 U.S.C. §§ 1343, 1346, and 2. Count Seven charged both defendants with violating the Travel Act, in violation of 18 U.S.C. §§ 1952(a)(3) and 2. On November 11, 1999, Hochevar and

Cotten were convicted on all charges except Count Seven.

The charges against Hochevar and Cotten arise out of a sting operation conducted by the FBI and its undercover agent, Joseph Yastremski (a/k/a "Jeff Nolan"). Hochevar and Cotten struck a deal with Nolan under the terms of which Nolan would attempt to cause 250,000 shares of CGI Holdings stock to be purchased. In exchange for causing these shares to be purchased by his clients, Nolan was to receive a payment of 30,000 shares of CGI stock from Hochevar and Cotten. The existence of this payment to Nolan was to be kept confidential. Hochevar and Cotten sought to boost the price of CGI Holdings stock above five dollars per share. Although the defendants claimed that their goal was not to "pump and dump" the stock, the trial judge and the jury did not accept the defendants claim that they were attempting to build the value of CGI stock over the long term.

On appeal, the defendants (1) challenge the sufficiency of the evidence with respect to all of their convictions, (2) claim that the government deprived them of their constitutional right to "fair warning" by using deliberate ambiguity as to whether an FBI undercover agent was a stockbroker, (3) argue that the district court committed plain error by failing to provide the jury with written instructions during their deliberations, and (4) indicate that the district court erred in its loss estimate under U.S.S.G. § 2F1.1. We reject all of appellants arguments.

An appellant who challenges the sufficiency of the evidence bears a heavy burden. See United States v. Walker, 142 F.3d 103, 112 (2d Cir.), cert. denied, 525 U.S. 896 (1998). This Court views the evidence, whether direct or circumstantial, in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80 (1942). There is sufficient evidence to uphold a conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). We hold that the evidence presented to the jury was sufficient to establish the essential elements of Counts One through Six beyond a reasonable doubt.

Defendants claim that their due process right to "fair warning" was violated by Nolan's choice to be deliberately ambiguous about his role as a stockbroker. In United States v. Myers, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983), this Court rejected a claim that allegedly ambiguous conduct by the government violated the defendants' due process rights, while explaining that "[p]erhaps at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness." Id. at 843. Because the evidence supports a finding that the defendants knew that Nolan was carrying out the business of a "broker," the defendants' fair warning argument fails. Moreover, the fact that the defendants were willing to place stock in an account under a name other than Nolan's could lead a reasonable jury to conclude that the defendants were aware that making such a

payment was illegal, whether Nolan was a "broker" or some other type of financial advisor.

Judge Owen's decision not to provide the jury with written copies of his legal instructions would ordinarily be reviewed for an abuse of discretion. See United States v. Russo, 110 F.3d 948, 953-54 (2d Cir. 1997). However, because the defendants made no objection below to the lack of written jury instructions, the judge's decision not to provide written jury instructions is reviewed for plain error. See United States v. Delano, 55 F.3d 720, 732 (2d Cir. 1995). Defendants argue that this Court should make a finding of plain error with regard to the lack of written jury instructions because (1) the district court was biased against the defendants, (2) the legal issues in the case were complex, (3) the jury instructions were 70 pages long, and (4) the jury appeared confused during its deliberations. We reject these arguments and find no plain error committed by the district court. Judge Owen did not exhibit bias against the defendants, the legal issues and jury instructions were not abnormally complex or long, and any jury confusion that may have existed was resolved.

With respect to the district court's calculation of "loss" at sentencing, this Court reviews the district court's factual findings on loss for clear error and its conclusions about the meaning of the term "loss" de novo. See United States v. Jacobs, 117 F.3d 82, 95 (2d Cir. 1997), United States v. Mucciante, 21 F.3d 1228, 1237 (2d Cir. 1994). The district court is not required to calculate the loss with precision but

rather "need only make a reasonable estimate of the loss, given the available information." Jacobs 117 F.3d at 95 (internal quotation marks omitted). With respect to both defendants, we hold that Judge Owen's findings are sufficient for appellate review and that he made a "reasonable estimate of the loss, given the available information." Id.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: s/ Lucille Carr
Lucille Carr, Operations Manager

EXCERPTS FROM TRANSCRIPT AND RECORD OF JURY TRIAL *UNITED STATES v. GENE ANTHONY HOCHEVAR*, 98 Cr. 351 (RO) UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM INDICTMENT

* * *

Appendix 8

INTRODUCTION

1. At all times relevant to this Indictment, the defendant GENE ANTHONY HOCHEVAR represented himself to be a promotor of securities issued by CGI Holding Corp. ("CGIC"). From in or about 1983 through and including in or about 1990, HOCHEVAR was a broker-dealer licensed by the National Association of Securities Dealers ("NASD").

2. At all times relevant to this Indictment, the defendant GARY NEIL COTTEN represented himself to be a promotor of securities issued by CGIC.

3. At all times relevant to this Indictment, the common stock of CGIC was publicly traded on the over-the-counter "bulletin board" administered by the NASD.

* * *

MEANS AND METHODS OF THE CONSPIRACY

9. Among the means and methods by which GENE ANTHONY HOCHEVAR and GARY NEIL COTTEN, the defendants, and their co-conspirators would and did carry out the conspiracy were the following:

10. GENE ANTHONY HOCHEVAR and GARY NEIL COTTEN offered to make, and did make, secret payments in stock to an undercover law enforcement agent

posing as a securities broker (the "Undercover Broker"), in order to induce the Undercover Broker to sell securities issued by CGIC, with the understanding that this payment would not be disclosed to the customers;

11. GENE ANTHONY HOCHEVAR and GARY NEIL COTTEN, the defendants, transferred shares of CGIC stock to the Undercover Broker as a secret payment pursuant to their agreement to cause the Undercover Broker to sell CGIC securities to his customers;

12. GENE ANTHONY HOCHEVAR and GARY NEIL COTTEN agreed with the Undercover Broker that the secret payment of CGIC stock would be transferred to a brokerage account in the name of a friend of the Undercover Broker in an effort to disguise the fact of the secret payment;

13. GENE ANTHONY HOCHEVAR and GARY NEIL COTTEN, the defendants, used the facilities of interstate commerce, including telephones and telefacsimiles, between January 27, 1998 and February 27, 1998, in order to propose and discuss with the Undercover Broker the terms of their agreement to make secret, undisclosed payments of CGIC stock to the Undercover Broker, and to cause the transfer of CGIC stock from brokerage accounts controlled by HOCHEVAR and COTTEN to a brokerage account controlled by the Undercover Broker.

* * *

Appendix 10

EXCERPTS FROM TRANSCRIPT AND RECORD OF JURY TRIAL *UNITED STATES v. GENE ANTHONY HOCHEVAR,* 98 Cr. 351 (RO) UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM CROSS EXAMINATION OF KEVIN CAULEY

* * *

Q. Why was it that you made a point of telling Mr. Hochevar that Mr. Nolan was a hedge fund operator?

A. (CAULEY) That was at the direction of the FBI.

* * *

Q. I want to address specifically - - it is Exhibit No. 5, page two, line 20.

You would agree, would you not, that Mr. Hochevar specifically asked you the question, is he - - speaking of Mr. Nolan - - is he a broker or is he just - - and you said no, he runs a hedge fund, correct?

A. (CAULEY) Correct.

Q. And that's what the FBI told you to tell Mr. Hochevar, correct?

A. (CAULEY) Yes.

* * *

EXCERPTS FROM TRANSCRIPT AND RECORD OF JURY TRIAL *UNITED STATES v. GENE ANTHONY HOCHEVAR*, 98 Cr. 351 (RO) UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM GOVERNMENT EXHIBIT 5-T JANUARY 22, 1998, RECORDED TELEPHONE CALL BETWEEN DEFENDANT HOCHEVAR AND KEVIN CAULEY

* * *

HOCHEVAR: Okay is he um, is he a broker or is he...just...

CAULEY: No mm mm, he runs a hedge fund.

HOCHEVAR: He, oh runs a hedge fund okay.

CAULEY: Mm hm.

HOCHEVAR: Okay.

CAULEY: And numerous other enterprises.

HOCHEVAR: Okay. Great so we won't be dealing, we can deal directly with him.

CAULEY: Yup.

* * *

EXCERPTS FROM TRANSCRIPT AND RECORD OF JURY TRIAL *UNITED STATES v. GENE ANTHONY HOCHEVAR*, 98 Cr. 351 (RO) UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM GOVERNMENT EXHIBIT 11-T JANUARY 28, 1998 RECORDED TELEPHONE CALL BETWEEN DEFENDANT COTTEN AND FBI AGENT YASTREMSKI ("NOLAN").

* * *

COTTEN: Okay. Are, Jeff (Nolan) are you a broker?

NOLAN: Excuse me?

COTTEN: Are you a broker?

NOLAN: Er, I was a broker. I just manage a fund now with some guys, like retirement accounts and stuff.

COTTEN: Okay, so you're not a broker.

NOLAN: Well, I do have a license.

COTTEN: Yeah, but this don't get us in any trouble.

NOLAN: Well I do have a license. Yes I do. I do have, I, I have a series 7 and 63.

COTTEN: But you don't, but you don't, you're not a brokerage firm. You do, you don't trade.

NOLAN: Well I have an account over at Pershing which um, I have my license, as a, it's a prime account that I have over there, Gary.

COTTEN: Right.

NOLAN: And um I do the er the trades for the clients there so, um, you know, my license is just basically parked

over there but I do execute the trades on behalf of like yeah call me a broker or whatever you want, yeah.

COTTEN: Yeah. Well um the only thing I'm trying to, trying to get at. I don't I don't want anything to cause me or, me, you or the company a problem. Er you know if I, if I give you this, these shares I can't give it to a broker dealing in a, in a house, can I? That doesn't mean, just tell me how to do it. I don't, I'm not, I'm not trying to er, er tell you how to do anything.

NOLAN: Well I have an account you can send it to.

COTTEN: Okay.

NOLAN: That is, does that work for you?

COTTEN: Er, as long as we can't get in trouble.

* * *

EXCERPTS FROM TRANSCRIPT AND RECORD OF JURY TRIAL *UNITED STATES v. GENE ANTHONY HOCHEVAR,* 98 Cr. 351 (RO) UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appendix 15

EXCERPTS FROM DIRECT EXAMINATION OF FBI AGENT YASTREMSKI

* * *

Q. Agent Yastremski, on this transcript 11T, the top of page two at line 3, you state to Mr. Cotten, er, I was a broker, I just manage a fund now with some guys, retirement accounts and stuff.

Why did you say that to Mr. Cotten?

A. He had caught me off guard with the question, are you a broker. I wasn't expecting that at the time.

Q. And how did you being caught off guard cause you to say, I was a broker?

A. When I was doing this undercover role, I wasn't fully back-stopped.

Q. What do you mean by back-stopped?

A. Meaning in the previous undercovers I had did, I had a name that I used that was fully registered, licensed with the NASD. I had an actual firm that if you called information in the phonebook they would give you that firm, it had a real phone number, had a real business location. This was simply me using a phone within the squad area to do this role, so I

wasn't completely back-stopped with my name, Jeff Nolan. I had chosen the name Jeff Nolan to use for a reason.

Q. What was that reason?

A. In the CRD which contains the names of the individuals that are registered brokers in the industry, there are several Jeff Nolans. There was one particular Jeff Nolan who fit about my same age, was from the New York City area, I had his complete printout of the places he worked since high school, and I realized that if Mr. Cotten, Mr. Hochevar had checked on Jeff Nolan, if they had called the 800 number that the NASD has available, they could possibly pull this same Jeff Nolan, I could somehow schmooz my way around to pulling off that maybe I was this Jeff Nolan, but that I did have licenses that the Jeff Nolan that I was portraying had, a Series 7, Series 63, that if they checked that I would say yes, that's me, I am the guy with the license, as I told Mr. Cotten, I do have the license.

Q. So when you say you were caught off guard, what do you mean?

A. That I didn't expect that question at the time. And my response was trying to stall for time. I said, er, I was a broker, just blurted that out to try and buy some time to remember I was back-stopped to a certain extent of having a name that I sued of a person, a real person that was registered that had the license and fit my general description.

Appendix 17

* * *

EXCERPTS FROM TRANSCRIPT AND RECORD OF JURY TRIAL *UNITED STATES v. GENE ANTHONY HOCHEVAR*, 98 Cr. 351 (RO) UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM CROSS EXAMINATION OF FBI AGENT YASTREMSKI

* * *

Q. Would you also say that there isn't anything wrong with the promoter paying a fee to people to promote a stock if it is done correctly?

A. Depends who he is paying, depends on the circumstances.

Q. If it is done correctly, right?

A. That's a very broad statement. Depends who he is paying, depends on the circumstances.